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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

HESPERIA WATER DISTRICT, Plaintiff and Respondent, v. MICHAEL MYERS, Defendant and Appellant.	E046696 (Super.Ct.No. VCVVS035154) OPINION

APPEAL from the Superior Court of San Bernardino County. Larry W. Allen, Judge. Affirmed.

Michael B. Myers, in pro. per., for Defendant and Appellant.

Aleshire & Wynder, Eric Dunn and Anthony R. Taylor for Plaintiff and Respondent.

Defendant and appellant Michael B. Myers purchased a property at a tax lien sale. Plaintiff and respondent Hesperia Water District (the District) filed a foreclosure action for unpaid assessments against the property. Defendant's contentions on appeal relate solely to the award of attorney fees to the District; defendant contends that the trial court

erred in awarding any attorney fees, and that it abused its discretion in setting the amount of fees. We affirm.

FACTS AND PROCEDURAL HISTORY

In 1988, the District created an assessment area pursuant to the Municipal Improvement Act of 1913 (Sts. & Hy. Code, § 10000 et seq.), which encompassed the area in which the subject property lies. Assessments against the properties within the assessment area were passed in 1988, to repay bonds for improvements such as sewers. In 2004, the recorded assessment lien was $10,831.54; the District filed an action for foreclosure as provided by Streets and Highways Code section 8830 et seq. The bond assessments had first become delinquent in 1995. The foreclosure action sought recovery of the delinquent installments, delinquency penalties, interest, and fees. In addition, the District claimed costs and expenses, including attorney fees, pursuant to Streets and Highways Code section 8831.

In January 2005, the District moved ex parte to stay the foreclosure litigation. The County of San Bernardino (the County) had conducted a tax lien sale of the property, and was holding excess proceeds of the sale. The District intended to apply to the County to satisfy its lien from the excess proceeds, but the County was required to hold the funds for at least one year after the sale. If the District was able to recover the delinquent assessments, it could then dismiss the complaint against defendant and others (the alleged owners of the property) without incurring further litigation fees. The District had agreed with defendant, in the meantime, to "hold off on further litigation" until the District could recover its money from the excess proceeds of the tax lien sale, and defendant would

"pay the current special assessments as they become due." The trial court granted the motion, and the action was stayed until July 8, 2005.

Defendant filed an answer in May 2006, denying that he owned the property. As the District explained in a motion to serve defendant by service on the Secretary of State, the registered purchaser of the property at the tax lien sale was "MICHAEL B. MYERS A Limited Liability Company" (the LLC). However, the LLC was not registered with the California Secretary of State, and had no designated agent for service of process in California. The District's complaint named the LLC as the defendant in the action, and apparently had served Michael B. Myers personally. It was as an individual that defendant had answered the complaint and denied ownership of the property. The LLC was registered, however, with the State of Kansas with the same address as defendant. "Because [the] LLC has failed to register with the California Secretary of State in compliance with Corporations Code section 17050 et seq., [the] LLC is prohibited from transacting business or defending against an action in the State of California . . . . Further, a foreign limited liability company . . . that is transacting business in the State of California without registration is deemed to appoint the California Secretary of State as its agent for service of process regarding causes of action arising out of that transaction of business in California . . . ." Thus, the District requested leave to serve the LLC by delivery to the California Secretary of State. The trial court granted this motion.

In the meantime, in September 2005, the District reported to the court in a case management statement that the County had recently paid the past due assessments of $9,990.70. The District expected that the matter had been settled. However, the

settlement had been conditioned on defendant's payment of the subsequent installments as they became due; in a case management statement of July 2006, the District reported that defendant had failed to pay the additional assessments, which were now delinquent and outstanding in an amount of $1,628.44, plus unpaid attorney fees and litigation costs.

The LLC was duly served, and proof of service of summons was filed in June 2007. In September 2007, defendant in propria persona filed an answer on behalf of the LLC, acknowledging that the limited liability company was no longer in good standing, and that there was no longer any distinction between defendant, the individual, and the LLC. In other words, defendant no longer denied that he owned the property.

The District's case management statement in October 2007 indicated that the delinquent assessments had increased to $2,860.44.

In December 2007, the District moved for summary judgment against defendant. In its statement of undisputed material facts, the District noted that defendant now admitted he was the owner of the property, and pointed out that as of 2006, there were more delinquent assessment installments owed on the property.

Defendant filed no opposition to the motion for summary judgment, but instead asked for a continuance. The trial court denied the continuance, and on the date of the hearing, granted the District's motion for summary judgment. The trial court entered judgment for the District, ordering the property to be sold.

In March 2008, the District moved for entry of judgment and an award of attorney fees and costs in the amount of $28,098.23. Defendant opposed the motion for attorney fees and costs, arguing that the amount requested was excessive; although the case had

originally been filed in 2004, the previously delinquent amounts had been paid by the excess sale proceeds (from the County to the District). Thus, defendant argued, attorney fees and costs should be allowed only to the extent needed to recover the subsequent delinquency of $3,012.60, and none related to recovery of the earlier $9,990.70 delinquency. Defendant also complained that the District had promised in 2005, in its application to stay the litigation proceedings, to dismiss the suit once the excess proceeds had been received from the County; however, the District did not so dismiss the suit after payment.

The trial court granted judgment for $3,532.60 in delinquent assessments, $15,000 for reasonable attorney fees, and $4,364.98 in litigation costs.

Defendant now appeals the award of attorney fees and costs.

ANALYSIS

I. Standard of Review

Defendant has not appealed from the judgment, in terms of the summary judgment motion as such, but only from the award of attorney fees and costs included as part of the judgment. In setting the amount of reasonable attorney fees, the trial court has a broad discretion. (*Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, 452.) We review the court's order for abuse of that discretion. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894.)

In some measure, defendant appears to contend that the District used an improper procedure in requesting fees. Because the resolution of this issue requires resort to

construction of statutory or other written language, we review that matter de novo. (*Barner v. Leeds* (2000) 24 Cal.4th 676, 683.)

II. The Attorney Fees Award Was Proper

Defendant asserts that when he bought the property at the tax lien sale, he paid $60,000, which created excess proceeds of $30,000, which should have been sufficient to satisfy any claim of the District against the property. The District duly made its claim for excess proceeds to the County, and in the meantime asked the court to stay the foreclosure litigation. In its papers requesting the stay, the District represented that, upon payment, it would be dismissing the suit against defendant. Defendant asserts that the District apparently reneged on this representation (1) by continuing to maintain the suit, and (2) by asking defendant to pay its attorney fees and costs, instead of including the attorney fees and costs in the excess proceeds claim to the County.

The District's expectation that the litigation could be concluded and dismissed after its excess proceeds claim was processed was based on the agreement with defendant that defendant would pay any further assessment installments as they came due. Defendant failed to do so, however, and thus new sums became delinquent. The covenants on the bonds for which the assessments are collected require the District to foreclose on delinquencies. The District's representation of its intention to dismiss the proceedings was dependent upon conditions which did not materialize; its covenant obligation to foreclose on delinquencies also intervened to prevent dismissal, because defendant failed to pay the new installments when they became due.

Defendant's claim that he "did not receive direct notice of any additional assessments" did not excuse his failure to pay them. The assessments are included in the property tax bill issued by the County tax collector; Revenue and Taxation Code section 2610.5 provides that the "[f]ailure to receive a tax bill shall not relieve the lien of taxes, nor shall it prevent the imposition of penalties imposed by this code." Even after defendant knew of the delinquencies, he still never paid them.

To the extent defendant contends that the attorney fees and costs should have been charged to the District's excess proceeds claim against the County, rather than maintained against defendant, he is mistaken. Streets and Highways Code section 8831 provides: "Costs in the action shall be fixed and allowed by the court and shall include a reasonable attorney's fee, interest, penalties and other charges or advances authorized by this division, including reasonable administrative costs incurred by the city in pursuing the foreclosure, and when so fixed and allowed by the court the costs shall be included in the judgment." Thus, costs, including reasonable attorney fees, are awarded by the court, and relate to the foreclosure litigation. That litigation was occasioned by the delinquency of the assessment payments, independently of the District's excess proceeds claim to the County. This principle also disposes of defendant's argument that the attorney fees order somehow violates Revenue and Taxation Code section 3712. That section provides generally that the deed of a tax lien purchase conveys title free and clear of all encumbrances existing before the sale, with certain exceptions. An express exception or "[t]he lien for taxes or assessments or other rights of any taxing agency that does not consent to the sale under this chapter." (Rev. & Tax. Code, § 3712, subd. (b).) The lien

for assessments, and the rights attendant thereto, thus generally survive the sale of the property. Those rights include the rights to enforce the lien, such as starting and maintaining the foreclosure litigation, and the right to recover litigation costs, including attorney fees.

Revenue and Taxation Code section 3712, subdivision (f), upon which defendant relies, also provides that a tax sale deed is subject to "[u]npaid assessments under the Improvement Bond Act of 1915 . . . that are not satisfied as a result of the sale proceeds being applied pursuant to Chapter 1.3 . . . of Part 8, or that are being collected through a foreclosure action pursuant to Part 14 . . . . A sale pursuant to this chapter shall not nullify, eliminate, or reduce the amount of a foreclosure judgment pursuant to Part 14 . . . ." Defendant appears to take the view that Revenue and Taxation Code section 3712, subdivision (f), means that the excess proceeds of the tax sale wiped out the foreclosure judgment and effectively made the circumstances such that no prior foreclosure action existed. In fact, the provision states precisely the opposite, that the deed is subject to "[u]npaid assessments . . . that are being collected through a foreclosure action," and that a tax sale "shall not nullify, eliminate, or reduce the amount of a foreclosure judgment . . . ." In any case, the rights of the taxing agency survive under subdivision (b), and defendant took the property subject to the tax lien. The digest of the bill enacting the provision states: "(41) Existing law provides, in the case of property that is tax defaulted, that the deed conveys title to the purchaser free of all encumbrances of any kind, except a number of specified liens, assessments, and taxes. [¶] This bill would provide that the title of a piece [of] property that is sold in tax default is not free of

unpaid assessments that are being collected through a foreclosure action, as specified, and that the sale shall not nullify, eliminate, or reduce the amount of a foreclosure judgment, as specified." (Stats. 2007, ch. 670 (AB No. 373) Digest of Bill.; Deerings Adv. Leg. Svc. § 114, p. 114.)

The fixing of reasonable attorney fees is also a matter requiring the exercise of judicial discretion, and not simply a rote calculation. The excess proceeds claim to the County is based upon the property lien for the delinquent assessments; the lien amounts (i.e., the assessments, fees and penalties) are fixed and readily calculable. Litigation costs, including reasonable attorney fees, by contrast, are not set according to a fixed arithmetic process. Streets and Highways Code section 8831 is not authority for the proposition that costs and attorney fees, which must be judicially determined, may be appended to the excess proceeds claim. Indeed, the statutory requirement of judicial determination indicates otherwise. Defendant's attempt to shift responsibility for the costs of litigation to the County is without merit.

Defendant objected to the reasonableness of the claimed fees and costs on numerous grounds, i.e., that the fees were substantially unrelated to the newly delinquent assessments, the billings attached to the claim were extensively redacted, the attorney fees claimed dated back to 2004, before the County could even have paid any excess proceeds to the District, the rate of $95 per hour for paralegal work was excessive, no reasonable basis was stated for any of the claims, the fees and costs were disproportionate to the $3,532.60 delinquency, the hours claimed were not categorized, the services were not specifically described in the redacted billings, the amount of non-attorney services

was excessive, the District unfairly claimed attorney fees and costs relating to the other defendants in the case, the District did not file a memorandum of costs pursuant to California Rules of Court, rule 3.1700, and the costs claimed were not recoverable under Code of Civil Procedure section 1033.5.

The attorney fees and costs awarded were reasonable. Defendant's argument otherwise is based upon a misunderstanding of the law and upon inapposite authorities.

Defendant urges, for example, that the attorney fees in the litigation were "disproportionate to the underlying recovery." There is, however, no "proportionality" requirement, as such, in Streets and Highways Code section 8831. As the District points out, the bond covenants require that a foreclosure action be brought for delinquent assessments; such litigation imposes similar duties for both small and large delinquencies. There is no "general proposition that an award of attorney fees under a fee statute must always be commensurate with or in proportion to the degree of success obtained in the litigation." (*Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1397.)[1]

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[1] *Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106 involved the private attorney general doctrine, an issue wholly absent here. In awarding private attorney general fees, it is proper to assess the extent to which the litigation benefits the public interest as compared to the party's private pecuniary interests. It does not announce a general "proportionality" rule.

Similarly, *Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865 does not establish a "proportionality" rule of general applicability. There, the court considered a contingency fee award of 20 percent in an inverse condemnation proceeding. The inverse condemnation award itself already included compensation, based on the contingency fee agreement, to the property owner for costs of suit and attorney fees. The attorneys were thus surcharging all the portions of the inverse

[footnote continued on next page]

Defendant relies on *El Escorial Owners Assn. v. DLC Plastering* (2007) 154 Cal.App.4th 1337 and *Levy*, *supra*, 4 Cal.App.4th 807 as establishing that the award here was improperly based on excessive rates or inadequate documentation. In *El Escorial*, a construction defect case, the appellants argued that the trial court had erred in reducing their attorney fees by apportioning their time spent between the contract and the tort claims. The Court of Appeal upheld the apportionment and fee reduction, noting that matters such as inadequate documentation or excessive hourly rates could also be taken into consideration in the exercise of discretion. (*El Escorial*, at p. 1366.) Here, the trial court based its award—which also represented a significant reduction from the total fees requested by the District—on a full examination of the record, including an assessment of the substantial amount of work done, and not on the submitted billings. *Levy* holds that a claimant must prove that the hours they sought were reasonable and necessary (*Levy*, *supra*, 4 Cal.App.4th at p. 816), but the court's exercise of discretion here was properly based upon adequate evidence; the court's own record provided the basis. That record also includes evidence of defendant's own conduct which prolonged and increased the costliness of the litigation: he failed to live up to his agreement to pay the subsequent assessment installments as they came due; he insisted that the LLC, and not himself individually, was the owner of the property, thus requiring additional investigation and

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[footnote continued from previous page]
condemnation award, including the attorney fees portion, with an additional 20 percent. The circumstances are inapposite.

Levy v. Toyota Motor Sales USA, Inc. (1992) 4 Cal.App.4th 807 (*Levy*) was another private attorney general case.

motions to achieve service on the LLC; once service on the LLC was achieved, defendant admitted that the LLC was defunct and that there was really no distinction between himself individually and the LLC; and defendant displaced blame onto others.

As the District also points out, while it is generally true that a duplication of effort by multiple attorneys can be a ground for reducing an attorney fees claim (defendant cites *California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730), defendant has not shown which efforts were duplicated, or that the trial court here did not take account of such matters in fixing the fees awarded at the substantially reduced amount of $15,000.

Defendant has not shown that Streets and Highways Code section 8831 requires a memorandum of costs procedure, rather than a noticed motion, must be used. In addition, Streets and Highways Code section 8831, the more specific section in this case, is controlling on the kinds of costs which may be recovered, specifically including "reasonable administrative costs incurred by the city in pursuing the foreclosure."

In short, defendant has failed to demonstrate affirmative error requiring reversal. (See also Cal. Const., art. VI, § 13.)

DISPOSITION

The judgment award of attorney fees is affirmed. Plaintiff and respondent Hesperia Water District is awarded its costs on appeal, including reasonable attorney fees. (Cal. Rules of Court, rule 8.278(d)(2).)

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/s/ McKINSTER
J.

We concur:

/s/ RAMIREZ
P. J.

/s/ KING
J.